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80-1773

No.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

MYRON J. AUFIERO,
PETITIONER,

v.

OWEN L. CLARKE
AND
MICHAEL S. DUKAKIS,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented for Review.

I. The petitioner-public employee was discharged from his position as a Chief of Bureau in the Massachusetts Department of Corporations and Taxation (the Department) because of his political activity during the previous gubernatorial administration. That political activity consisted of his participation, in an advisory capacity, in the filling of vacancies in the Department. Those vacancies arose in the normal course and they were not created by partisan dismissals.

Both the District Court and the Court of Appeals characterized that political activity as "patronage" (Appendix A, pp. A2-A3; Appendix B, pp. A10, A12). In both *Elrod v. Burns*, 427 U.S. 347, 353 (1976) and *Branti v. Finkel*, 445 U.S. 507, 513 n.7 (1980), this Court expressly limited its holding to one form of patronage, i.e., partisan dismissals. Notwithstanding those limitations, both the District Court and the Court of Appeals held that since the petitioner's political activity was patronage activity, it was not protected by the First and Fourteenth Amendments to the Constitution of the United States (Appendix A, p. A3; Appendix B, pp. A12-A13).

Thus, the question presented for review is:

> Whether the holding that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments should be expanded to include other forms of patronage activity, more particularly: the practice of filling vacancies which occur in the normal course, or whether participation in that practice is activity protected by the First and Fourteenth Amendments.

II. In 1975, the petitioner-public employee was discharged for his past political activity, i.e., participation in patronage appointments, prior to this Court's decision in *Elrod v. Burns*, supra. The Court of Appeals held that the petitioner's

political activity was not constitutionally protected. The Court of Appeals further held that the principles of *Elrod* should not be applied retroactively to the petitioner's dismissal. Thus, the question presented is:

> Whether the Court of Appeals erred in holding that *Elrod v. Burns* should not be applied retroactively to the petitioner's discharge in 1975 where the Court of Appeals assessed the petitioner's pre-*Elrod* conduct not only under *Elrod* standards, but also under an expansion of those standards.

III. The petitioner-public employee was discharged from his position as a Chief of Bureau because of his past political activity and not to create an opening to be filled by the incumbent party. Thus, the question presented is:

> Whether the petitioner has established a valid claim for relief under decisions of this Court rendered prior to that of *Elrod v. Burns,* supra, more particularly, under *Perry v. Sindermann,* 408 U.S. 593 (1972) and *Keyishian v. Board of Regents,* 385 U.S. 589 (1967).

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MICHAEL S. DUKAKIS,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in this case on January 22, 1981.

Opinions Below.

The opinion of the District Court for the District of Massachusetts (filed April 11, 1980) has not been officially published. A copy of that opinion is annexed hereto as Appendix B at pp. A6-A13.

The opinion of the Court of Appeals for the First Circuit (filed January 22, 1981) has been officially published in the Federal Reporter at 639 F. 2d 49. A copy of that opinion is annexed hereto as Appendix A at pp. A1-A5.

Jurisdiction of the Supreme Court.

The judgment of the Court of Appeals for the First Circuit was made and entered on January 22, 1981. A copy of that judgment is annexed hereto as Appendix C at p. A14.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved.

U.S. Constitution, Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amend. XIV(1):

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

The petitioner brought suit under 42 U.S.C. § 1983 against the respondent Clarke, then Commissioner of the Department, and respondent Dukakis, then Governor of the Commonwealth, alleging that his (petitioner's) discharge from his position as a Chief of Bureau was arbitrary, without cause, and because of his membership in the Republican Party. The matter was tried, without a jury, and judgment entered for the respondents on April 11, 1980. Thereafter, the petitioner appealed that judgment to the Court of Appeals for the First Circuit. The judgment of the District Court was affirmed by the Court of Appeals on January 22, 1981.

Pertinent facts are briefly stated as follows:

In April of 1966, the petitioner joined the Department as a provisional sales tax examiner. In 1970, he joined the Republican Party and became active in the gubernatorial campaign of Francis W. Sargent. During the campaign, he became friendly with Harold Greene, who subsequently served as Governor Sargent's patronage secretary. The petitioner became Greene's advisor on appointments within the Department. Although appointments were nominally made by the Commissioner of the Department, it had been a practice to consider them within the Governor's patronage preserve.

The petitioner, promoted in 1970 to Supervisor in the Sales Tax Bureau, and in 1972 to Chief of Bureau, Bureau of District Offices, would keep Greene informed of vacancies in the Department and would make recommendations concerning filling those vacancies. The vacancies arose in the normal course and were not created by partisan dismissals. Between fifty (50) and one hundred (100) positions were filled during the period in issue.

In 1974, respondent Dukakis defeated Governor Sargent. In 1975, he appointed respondent Clarke as Commissioner of

the Department. He authorized the new Commissioner to remove any patronage employees who were not qualified, with particular mention of Harold Greene who had been appointed a Chief of Bureau in 1973.

Clarke assumed his duties as Commissioner on July 11, 1975. On that day, he dismissed the petitioner. On July 14, 1975, Clarke dismissed Harold Greene. The petitioner subsequently requested reinstatement to his Civil Service position of supervisory tax examiner. That request was granted and the petitioner was so reinstated.

There were no other removals or reassignments, except for the demotion of Pasquale Pignato, also a Republican. The District Court found that the Pignato transfer was not due to his being a Republican.

The District Court found that the petitioner was not discharged because of his political affiliation. Rather, he was discharged because of his political activity during the Sargent administration. Since that activity involved participation in patronage appointments, the Court held that it was not constitutionally protected. Accordingly, the District Court held that the petitioner was not entitled to relief.

The Court of Appeals agreed that patronage activities by public employees are not constitutionally protected. Although the Court of Appeals doubted the validity of discharging a public employee for his past patronage activities, the Court of Appeals decided the case on the question of the retroactivity of *Elrod v. Burns*, supra. The Court of Appeals held that events occurring prior to the *Elrod* decision date, June 28, 1976, shall not be subject to the holding of that case. The Court of Appeals further held that pre-*Elrod* decisions such as *Perry v. Sindermann*, supra, and *Keyishian v. Board of Regents*, supra, did not clearly foreshadow *Elrod's* result. Thus, the Court of Appeals stated that it would not, "unaided by the Supreme Court's later teaching,"

find that pre-*Elrod* decisions compelled *Elrod's* result. The judgment of the District Court was affirmed.

Reasons for Granting Writ.

The writ of certiorari should issue for the following reasons:

1. IN HOLDING THAT PATRONAGE ACTIVITIES BY GOVERNMENT EMPLOYEES ARE NOT CONSTITUTIONALLY PROTECTED, THE COURT OF APPEALS HAS EXPANDED THE HOLDING OF *ELROD v. BURNS*, SUPRA, AND DECIDED AN IMPORTANT FEDERAL QUESTION WHICH SHOULD BE RESOLVED BY THIS COURT.

In *Elrod v. Burns,* supra at 353, this Court expressly stated that, although there are many forms of patronage, the Court was only concerned with one form of patronage, i.e., "dismissing public employees for partisan reasons." This limitation was reiterated in *Branti v. Finkel,* supra at 513 n.7.

The instant case did involve a partisan dismissal in that the petitioner was discharged from his position as a Chief of Bureau because of his past political activity. That activity included participation in the practice of filling vacancies which occurred in the normal course. That activity did not involve participation in partisan dismissals to create vacancies to be filled by loyal supporters. Both the District Court and the Court of Appeals characterized the petitioner's past political activity as patronage. Despite the fact that that activity was not the form of patronage condemned in *Elrod,* both the District Court and the Court of Appeals held that that activity was not protected by the First and Fourteenth Amendments to the Constitution of the United States.

As noted in both *Elrod* and *Branti*, patronage practices are neither new nor unique to American politics. It is "a practice as old as the Republic, a practice which has contributed significantly to the democratization of American politics." *Elrod v. Burns*, supra at 376 (dissent, Powell, J.).

Freedom of belief is at the heart of the First Amendment. The right to believe is meaningless unless the right to express that belief and associate with others for the common advancement of that belief is also protected. As stated in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957):

> Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the Bill of Rights. Exercise of these freedoms . . . has traditionally been through the media of political associations.

That right to associate and engage in political expression extends to public employees. As stated in *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979):

> The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. . . .

The many faces of patronage are an integral part of American political life. Patronage has contributed to the political process in positive and negative ways. Any system involving the interaction of human beings is subject to abuse. In *Elrod v. Burns*, supra, and *Branti v. Finkel*, supra, this Court declared partisan dismissals to create vacancies an abuse which was not constitutionally protected. However, to extend the holding of *Elrod* and *Branti* to all forms of patronage, regardless of whether the particular form of patronage involves abuses, requires the decision of this Court. The practical implications of such a ruling on Amer-

ican politics at the federal, state and local levels cannot be ignored.

Those participating in the political process must be on notice as to what activity is or is not protected by the First and Fourteenth Amendments. To hold that all forms of patronage are constitutionally condemned is a dramatic and drastic departure from the principle that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association." *Sweezy v. New Hampshire,* supra at 250.

The Court of Appeals recognized the potentially disruptive impact of its holding that patronage activities by government employees are not constitutionally protected. The Court of Appeals stated, Appendix A at p. A3.

> The fact is, however, that [petitioner] was removed from his higher level position because of something he had done in the past and which, because of the change in administration, he could not do in the present. If [petitioner] . . . can be so sanctioned, we see no reason why an administrator could not discharge employees who had played important patronage roles years, or even decades ago, or employees who had received and continue to enjoy the benefits conferred by patronage activists. . . .

In expressing grave doubts as to the validity of discharging a public employee for past conduct, the Court of Appeals sought to avoid a practical problem. However, in avoiding one problem, an equally serious problem still looms. Those presently engaging in patronage practices, either by actively participating in the process or by being beneficiaries of patronage, are now vulnerable, having lost constitutional protection. Each position filled is open to challenge by unsuccessful candidates or by political adversaries on the grounds that the person filling the vacancy knew the "right" person, belonged to the "right" party or supported the "right" candidate, irrespective of qualifications.

It is recognized that partisan political activities of government employees may be regulated. *United Public Workers of America v. Mitchell,* 330 U.S. 75, 96 (1947). However, such regulation should not be at the discretion of an incumbent administration. It should be in the form of a duly promulgated statute, ordinance or regulation, or by a judicial decision setting forth the guidelines to which a public employee must conform. At the time petitioner engaged in the political activity here involved, he did not have the benefit of such regulation.

Since this Court has expressly limited its holding in *Elrod v. Burns,* supra, and *Branti v. Finkel,* supra, a decision as to whether the holding of those cases should be expanded to include other forms of patronage should be rendered by this Court.

2. IN HOLDING THAT THE PETITIONER HAD NO LEGAL PROTECTION AGAINST REMOVAL IN THE ABSENCE OF *ELROD,* THE COURT OF APPEALS RENDERED A DECISION INCONSISTENT WITH THE DECISIONS OF THIS COURT, WHICH INCONSISTENCY SHOULD BE RESOLVED BY THIS COURT.

There are two aspects to this case: the dismissal of the petitioner and the past political activity of the petitioner. Insofar as the dismissal of the petitioner was partisan in nature, the principles of *Elrod v. Burns,* supra, are clearly relevant. However, the factual situation here presented is distinguishable from that considered in *Elrod.* The petitioner was not dismissed to create an opening for a loyal supporter of the incumbent administration. He was dismissed because of his political activity during the previous administration.

At the time petitioner engaged in that activity, there was no statute, rule or judicial decision warning the petitioner that he would have no legal protection should he participate in that activity. As noted by the District Court at note 2 (Ap-

pendix B, p. A7), although appointments were nominally made by the Commissioner, it had been the "practice to consider them as within the Governor's patronage preserve." There was no evidence that the petitioner engaged in abuses in the process of filling vacancies. The respondent Clarke had been directed to remove patronage appointees who were not qualified. Despite the fact that some fifty (50) to one hundred (100) positions had been filled, only the petitioner and Harold Greene were dismissed.

The Court of Appeals assessed the petitioner's conduct in light of *Elrod v. Burns,* supra. However, the Court of Appeals refused to apply *Elrod* retroactively to the partisan dismissal of the petitioner, holding that the holding of *Elrod* banning certain patronage dismissals was not "clearly foreshadowed." Appendix A, pp. A4-A5.

The petitioner concedes that insofar as *Elrod* banned certain partisan dismissals to create vacancies, that holding was not clearly foreshadowed. However, pre-*Elrod* decisions clearly established that public employees could not be discharged for exercising rights protected by the First and Fourteenth Amendments. *Perry v. Sindermann,* supra; *Keyishian v. Board of Regents,* supra. Indeed, *Elrod* was based upon those prior decisions.

In effectively holding *Elrod* retroactive as to the petitioner's conduct, the Court of Appeals stripped the petitioner of constitutional protection against retaliation for engaging in political activity which had traditionally been protected by the First and Fourteenth Amendments. Thus, the decision of this Court was inconsistent with the principles set forth in pre-*Elrod* decisions and reiterated in *Smith v. Arkansas State Highway Employees,* supra at 465.

Conclusion.

For the reasons set forth above, the petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

United States Court of Appeals
For the First Circuit

No. 80-1315

MYRON J. AUFIERO,
PLAINTIFF-APPELLANT,

v.

OWEN L. CLARKE, ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.
[HON. WALTER JAY SKINNER, *U.S. District Judge*]

Before COFFIN, *Chief Judge,*
ALDRICH and BOWNES, *Circuit Judges.*

Regina L. Quinlan, with whom *John A. Aufiero* was on brief, for appellant.

Paul W. Johnson, Assistant Attorney General, with whom *Francis X. Bellotti,* Attorney General, was on brief, for appellees.

January 22, 1981

COFFIN, *Chief Judge.* This appeal presents the question whether a Chief of Bureau in a state's department of taxation may be demoted in 1975 for his earlier service as a source of information and recommendations relating to patronage hirings and promotion.

Plaintiff brought suit under 42 U.S.C. § 1983 against defendant Clarke, the Commissioner of Corporations and Taxation, and the Governor of Massachusetts, charging that his removal as Chief of Bureau for the Bureau of District Offices

was solely because of his membership in the Republican Party, and asking that such action be declared a violation of his constitutional rights, that he be reinstated, and that he be awarded $60,000 damages.

The following relevant facts were revealed in a non-jury trial. Plaintiff was first employed by the state in 1966 as a provisional sales tax examiner. In 1970 he joined the Republican Party. While working in the gubernatorial campaign of Governor Sargent, he became friendly with one Harold Greene, later the Governor's patronage secretary, and, indeed, served as Greene's advisor on appointments within the Department of Corporations and Taxation. Plaintiff, promoted in 1970 to Supervisor in the Sales Tax Bureau, and in 1972 to Chief of Bureau, Bureau of District Offices, would keep Greene informed of vacancies in his Department and would recommend for or against specific employees receiving appointments or promotions. In all, between 50 and 100 positions were filled in this manner during plaintiff's tenure. Governor Dukakis defeated Governor Sargent in 1974, and in 1975, appointed defendant Clarke the new Commissioner of Corporations and Taxation, giving him a mandate to abolish patronage and to put the department on a merit hiring basis. Clarke then fired Greene and demoted plaintiff to the position of supervisory tax examiner.

The district court held that plaintiff had established a prima facie case that his discharge was because of his participation (i.e., his sharing of control with Greene) in patronage appointments. It also held that defendants had not proven that plaintiff would have been removed from his job for unsatisfactory performance of his duties. The court, applying *Elrod v. Burns*, 427 U.S. 347 (1976), as modified by *Branti v. Finkel*, 445 U.S. 507 (1980), determined that political affiliation was not relevant to plaintiff's old job of Bureau Chief, but that plaintiff was not demoted because of his political beliefs, asso-

ciation, or party affiliation, but only because of his patronage activity — the very conduct condemned in *Elrod* and *Branti* — and therefore not constitutionally protected. It accordingly rendered judgment for defendants.

We see difficulty in the district court's analysis. Under *Elrod* and *Branti* it is clear that one cannot be discharged from a position "solely for the reason that [he is] not affiliated with or sponsored by" a political party. *Branti, supra,* 445 U.S. at 517, *quoting Elrod, supra,* 427 U.S. at 350. It is also clear that patronage activities by government employees are not protected. That partisan political activities can be regulated has long been acknowledged. *United Public Workers of America* v. *Mitchell,* 330 U.S. 75 (1947). Had plaintiff been removed from his position because he was currently engaged in patronage activism, contrary to state statute or even contrary to administration policy, there could be no doubt that he was beyond the pale of protection.

The fact is, however, that plaintiff was removed from his higher level position because of something he had done in the past and which, because of the change in administration, he could not do in the present. If plaintiff, notwithstanding *Elrod* and *Branti,* can be so sanctioned, we see no reason why an administrator could not discharge employees who had played important patronage roles years, or even decades ago, or employees who had received and continued to enjoy the benefits conferred by the patronage activists. Such actions would equally well subserve the justification articulated by the state, i.e., that plaintiff's demotion "vindicates" the merit system, eliminates the appearance of political bias, and removes partisans from the work force. But we would have grave doubts of the legitimacy of such sweeping actions. They would trench upon firing for mere affiliation.

Having such questions, we prefer to decide this case on what appears to us as the clearer ground of the non-retroactivity of *Elrod.*[1] The first criterion identified in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971) as mandating non-retroactivity is that the decision to be applied "must establish a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed". *Id.* at 106. Whether or not cases in factually different non-partisan contexts such as *Perry* v. *Sinderman,* 408 U.S. 593 (1972) and *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967) may in retrospect be seen in harmony with the underlying rationale of *Elrod,* we may certainly say that banning patronage dismissals of all but policy-making or confidential government employees was not "clearly foreshadowed". *Cf. Loughney* v. *Hickey,* F.2d (3d Cir. No. 1158, Nov. 7, 1980), slip op. at 4 (Aldisert, J., concurring) (a much stronger statement).

As for *Chevron's* second criterion, a determination "whether retrospective operation will further or retard [the] operation" of the rule, *Chevron, supra,* 404 U.S. at 106-07, this appears to us as a neutral or unhelpful inquiry in this case. We cannot say, in any event, that retroactivity is essential to *Elrod's* prospective vitality. The final factor, however, "the inequity imposed by retroactive application", *id.* at 107, appears to weigh clearly on the scale of non-retroactivity. To the extent that causes of action have survived relevant limitations periods, a retroactive application of *Elrod* and *Branti* could propel former government employees, who generally

[1] We are aware of at least two prior occasions when we have applied *Elrod* to pre-*Elrod* events, *Alfaro de Quevedo* v. *De Jesus Shuck,* 556 F.2d 591 (1st Cir. 1977) and *Rivera Morales* v. *Benitez de Rexach,* 541 F.2d 882 (1st Cir. 1976). In neither case, unfortunately, does it appear that the retroactivity issue was raised or considered.

had no expectation of tenure, into litigation which, if successful, would necessitate the eviction of their blameless successors or an awkward and redundant holding of dual offices. The liability of local governmental bodies that had acted in reliance on the nearly unanimous rejection of the *Elrod* rationale in the prior case law could be enormous. *See Owen* v. *City of Independence,* 445 U.S. 622 (1980) (municipality may not assert the good faith of its officers as a defense to § 1983 liability).

We therefore hold that events occurring prior to the *Elrod* decision date, June 28, 1976, shall not be subject to the holding of that case. We find ourselves in agreement with the Fourth Circuit in *Ramey* v. *Harber,* 598 F.2d 753 (1978), *cert. denied,* 442 U.S. 910 (1979), as well as the majority of district courts which have considered the issue.[2] Plaintiff argues that notwithstanding *Elrod* his discharge was constitutionally offensive under pre-*Elrod* decisions such as *Perry* v. *Sinderman* and *Keyishian* v. *Board of Regents, supra.* Our conclusion that these cases did not clearly foreshadow *Elrod* necessarily means that we do not consider them to compel *Elrod's* result, nor would be, unaided by the Supreme Court's later teaching, reach that result ourselves as a matter of first impression. In this regard, we note that plaintiff's case below was based entirely on *Elrod,* despite the early assertion of a non-retroactivity defense. Accordingly, since we are of the view that plaintiff had no legal protection against removal in the absence of *Elrod,* we must *affirm* the judgment of the district court.

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[2] *Raggio* v. *Matunis,* 489 F. Supp. 16 (E.D. Pa. 1979); *Marino* v. *Bowers,* 483 F. Supp. 765 (E.D. Pa. 1980); *Litwhiler* v. *Hildlay,* 429 F. Supp. 984 (M.D. Pa. 1977); *contra, Retail Clerks International Ass'n* v. *Leonard,* 450 F. Supp. 663 (E.D. Pa. 1978).

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MYRON AUFIERO, Plaintiff,	*	
	*	CIVIL ACTION
v.	*	NO. 77-2010-S
OWEN CLARKE, ET AL., Defendants.	*	

FINDINGS, RULINGS AND ORDER FOR JUDGMENT

April 11, 1980

SKINNER, D.J.

This action was brought by Myron Aufiero, a former Bureau Chief in the Department of Corporations and Taxation[1] of the Commonwealth of Massachusetts (the Department), alleging the deprivation of his constitutional right because of his demotion by the defendants Clarke and Dukakis. He claims he was demoted because of his membership in the Republican Party. He alleges jurisdiction under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. §§ 1981 through 1985 inclusive. No racial animus is alleged. The only applicable substantive statute is 42 U.S.C. § 1983. So much of the complaint as purports to state claims under 42 U.S.C. §§ 1981, 1982, 1984 and 1985 is DISMISSED. The complaint, even as amended, states that the plaintiff's rights under the Constitution are found in Amendments IV, V, VII and XIV, Section 1.

[1] Now renamed the Department of Revenue.

Plaintiff's attorney has made no attempt to demonstrate the application of Amendments IV, V and VII, and I can perceive none. He relies in argument on *Elrod v. Burns*, 427 U.S. 347 (1976), a case based on the First Amendment, which is not mentioned in the Complaint, except inferentially by reference to Amendment XIV, Section 1. This case has been tried and argued on the basis of *Elrod v. Burns, supra*, and I shall treat the complaint as minimally sufficient to raise the issues presented by that case.

No evidence was presented which would warrant a finding against the defendant Dukakis, and the action was dismissed as to him at the close of the plaintiff's case.

The case was tried to the court without a jury.

FINDINGS OF FACT

A. *Historical Summary*

Aufiero never finished high school, but at some time sufficiently completed his studies to acquire a High School Equivalency Certificate. Before joining the Department he had operated a delicatessen. He joined the Department as a provisional sales tax examiner in April 1966. In 1970 he became active in the gubernatorial campaign of Governor Sargent, who was elected in that year. During the campaign he became friendly with Harold Greene, who subsequently served as Governor Sargent's patronage secretary. Aufiero became Greene's advisor on appointments with the Department.[2] In 1970 Greene secured for him the position of supervisor in the Sales Tax Bureau. In 1972, working through the Governor's appointment secretary, Greene secured for the

[2] These appointments were nominally made by the Commissioner but there appears to have been a practice to consider them as within the Governor's patronage preserve.

plaintiff the position of Chief of Bureau, Bureau of District Offices, the position from which he was later discharged. In 1973, the Governor's appointment secretary called the then Commissioner of Corporations and Taxation, Nicholas Metaxas, and told him to appoint Greene to the *then vacant post of Chief of Bureau*, Bureau of Excise Taxes. Metaxas protested, but eventually did as he was told.

Aufiero also proselytized for the Governor within the Department. For instance, one Capuano testified that although he was an independent, i.e., not a registered member of either party, he attended Sargent's fund raisers at the urging of Aufiero. He was appointed the Chief of the Income Tax Bureau during the Sargent administration on the recommendation of Greene. He was not discharged by Clarke and eventually retired in due course.

Sargent was defeated for reelection in 1974, and was succeeded by the defendant Dukakis. The position of Commissioner is a gubernatorial appointment. On July 10, 1975, Dukakis replaced Metaxas with the defendant Owen Clarke, who had been Deputy Commissioner under Metaxas. Metaxas remained with the Department and is presently a Deputy Commissioner. Dukakis told Clarke that he did not want to have any more patronage appointees in the Department and authorized Clarke to remove any patronage appointee who was not qualified. Greene's appointment was mentioned as being an example of the type of appointment Dukakis did not wish to see repeated.

On the following day, July 11, 1975, Clarke removed Aufiero as Bureau Chief and shortly thereafter reinstated him as a supervisory tax examiner.

The following Monday, July 14, Clarke fired Greene from the Department. The Bureau of Excise Taxes, of which Greene had been chief, was combined with the Bureau of Sales Taxes. The Bureau of Administrative Services was

combined with the Bureau of Planning and Research, and the former Chief of the Bureau of Administration, Henry Dardeno, succeeded Aufiero as Chief of the Bureau of District Offices. There were no other removals or reassignments of bureau chiefs, and no other demotions except for Pasquale Pignato, who had a provisional appointment as Assistant Bureau Chief under Mr. Dardeno. Pignato was transferred along with Dardeno to the Bureau of District Offices as his assistant, but because there was no position of Assistant Bureau Chief in that Bureau he was reduced in grade to his permanent level of supervisor. Pignato is an active Republican.

Pignato testified in substance that at the time of his demotion he asked Clarke if it was because he was a Republican. Clarke said, "It might be." Pignato said, "Who else?" Clarke said, "Greene and Aufiero."

Clarke denies that this conversation occurred. He says that he transferred Pignato because he did not want to waste Pignato's expertise in processing income taxes, which was needed in the Bureau of District Offices.

I think it more likely than not that Pignato was transferred to the Bureau of District Offices because his former position was eliminated once the Bureau of Administrative Services was merged with the Bureau of Planning and Research. A witness named White testified that Clarke and Pignato did not like one another, and this may have been a factor in the demotion. I am not persuaded that Pignato's Republicanism accounted for his transfer.

Four other Bureau Chiefs appointed during the Sargent administration, with the help of Harold Greene, remained in their post after Clarke became Commissioner, and except for one retirement in the ordinary course remain there today.

B. *The Reason for the Discharge*

1. *The plaintiff's prima facie case*

The plaintiff has established a prima facie case that his discharge was because of his political *activity*. He has not established a prima facie case that his discharge was because of his party *affiliation*. He introduced evidence that he was doing a satisfactory job. The critical evidence is that he was demoted at the same time as Greene was fired. There is no evidence in the case concerning Greene's performance. The plaintiff's evidence warrants the inference that the two of them were demoted and discharged because of their control of patronage in the prior administration. Greene, however, was not a Republican. Other bureau chiefs appointed by the Sargent administration were not dislodged. What distinguishes Greene, and Aufiero from them is their prior participation in patronage appointments, and I find that Aufiero has established a prima facie case that this participation was the reason for his demotion.

2. *The defendants' evidence of justification*

Once the plaintiff presented a prima facie case, the burden shifts to the defendant to show a non-political justification for the discharge by a preponderance of the evidence. *See* Rulings of Law, *infra*. The defendants introduced evidence that both Commissioner Metaxas and the defendants were displeased with Aufiero's performance because of his failure to go out to the district offices and his propensity to "hang around the State House" during business hours. Metaxas testified that he kept Aufiero on the job only because of his gubernatorial sponsorship. Metaxas held over for six months after Sargent left office, but did not discharge Aufiero during this period. The defendant Clarke does not appear to have re-

quired any change in the administration of the Bureau of District Offices when Dardeno was appointed, and so far as appears from the evidence, Dardeno is doing just about what Aufiero did. Pignato in fact testified that he really had nothing to do as Dardeno's assistant.

Accordingly, *I am* not satisfied that the defendant has satisfied the burden of proving by a preponderance of evidence that the plaintiff would have been fired regardless of his patronage activities; or as conversely stated, the defendant has not overcome the inference from the plaintiff's evidence that "but for" the patronage activity, the plaintiff would not have been fired.

3. *Nature of the position*

Under *Elrod v. Burns*, 427 U.S. 347 (1976), the prohibition against political discharge was limited to non-policymaking positions. That would have been a close question in this case, raising among other things, the issue of whether it is the potential of the position or the actual activities of the discharged employee that governs. The issue has been foreclosed by the Supreme Court's decision in *Branti v. Finkel*, 48 L.W. 4331 (March 31, 1980), decided after the trial in this case and while this opinion was being drafted. The relevant issue now is whether political affiliation has any relevance of the performance of the particular job. In this case, at least, it is clear that political affiliation has absolutely no relevance to the performance of the duties of Bureau Chief, Bureau of District Offices.

RULINGS OF LAW

A public employee, even one not classified under civil service, may not be discharged because of his affiliation with a

political party, nor may his continued employment be conditioned on his joining the political party then in power. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 48 L.W. 4331 (March 31, 1980). The only exception to the rule occurs when the political affiliation is relevant to the effective discharge of the office. The constitutional values which justify the intervention of the federal judiciary in the traditional processes of the federal and state executive branch are said to be the freedoms of association and belief. *Branti, supra*, 48 L.W. at 4333.

If the plaintiff presents a prima facie case of discharge because of constitutionally protected activity, the burden shifts to the defendant to prove by a preponderance of the evidence that the plaintiff would have been discharged for other reasons in any case. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979).

The determinative question in this case, in view of my findings of fact, is whether the activity for which the plaintiff was discharged was constitutionally protected.

The plaintiff was not fired because of his beliefs or association but because of his position in the prior administration. That position was related to his political association, i.e., patronage appointments, and might well be deemed protected if it did not involve the very conduct that was itself condemned in *Elrod v. Burns* and *Branti v. Finkel*. It is doubtful if even under those cases the same conduct can be both constitutionally condemned and constitutionally protected.

A distinction might be made between the hiring done by the plaintiff here, and the firing done by the defendants in *Elrod* and *Branti*. But these are obviously two sides of the patronage coin. Clearly, the inducement to suppress one's political philosophy and choice of party affiliation operates

equally forcefully on the person who seeks a job or promotion as it does on one who desires to retain one; e.g., the case of Capuano. *Branti*, 48 L.W. at 4335, n.2 (Powell, J., dissenting).

I conclude that the activity for which the plaintiff was discharged was not constitutionally protected.

ORDER FOR JUDGMENT

Accordingly, I find and rule that the plaintiff is not entitled to equitable relief or damages against the defendant Clarke, and I order that judgment be entered for both defendants.

/s/ WALTER JAY SKINNER
United States District Judge

Appendix C.

United States Court of Appeals
For the First Circuit

No. 80-1315.

MYRON AUFIERO,
PLAINTIFF, APPELLANT,
v.
OWEN CLARKE, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

January 22, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Ms. Quinlan and Mr. Johnson.]

Office-Supreme Court, U.S.
FILED
MAY 20 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1773

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980.

MYRON J. AUFIERO,
Petitioner,

v.

OWEN L. CLARKE
and
MICHAEL S. DUKAKIS,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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ARGUMENT

Petitioner Myron J. Aufiero (Aufiero) asserts that special and important reasons warrant review on writ of certiorari of the decision of the United States Court of Appeals for the First Circuit in Aufiero v. Clarke, 639 F. 2d 49 (1st Cir. 1981). Aufiero perceives three significant issues in the First Circuit's decision: (1) whether a public employee may claim First Amendment protection for his own patronage activity; (2) whether this Court's decision in Elrod v. Burns, 427 U.S. 347 (1976), should be applied retroactively to Aufiero's demotion in July, 1975; and (3) whether Aufiero had stated any claim for relief under such preceding decisions as Perry v. Sinderman, 408 U.S. 593 (1972), and Keyishian v. Board of Regents, 385 U.S. 589 (1967).

The Court should deny Aufiero's petition for writ of certiorari because the First Circuit's decision rests exclusively upon its holding that Elrod v. Burns does not warrant retroactive application under the principles established in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). The only other Court of Appeals which has ruled on this issue reached the same conclusion. Ramey v. Harber, 589 F. 2d 753 (4th Cir. 1978), cert. denied, 442 U.S. 910 (1979). With one exception, the District Courts have followed suit. Aufiero, 639 F. 2d at 52 n. 2. See also Farkas v. Thornburgh, 493 F. Supp. 1168, 1178 n. 23 (E.D. Pa. 1980) (suggesting that the related rule of Branti v. Finkel, 445 U.S. 507 (1980), should not be applied retroactively). By its denial of the petition for writ of certiorari in Ramey v. Harber, this Court has already confirmed that the

retroactivity of Elrod v. Burns does not constitute "an important question of federal law which has not been, but should be, settled by this Court." Sup. Ct. Rule 17.1(c). Moreover, this issue has lost any practical significance because the applicable statutes of limitation have presumably run upon the prosecution pursuant to 42 U.S.C. §1983 of claims which would apply the rule of Elrod v. Burns to events predating that decision. See, e.g., Kadar Corp. v. Milbury, 549 F. 2d 230 (1st Cir. 1977) (actions pursuant to 42 U.S.C. §1983 are governed by the Massachusetts statute of limitations for torts). Even if this Court were to rule that Elrod v. Burns should be applied retroactively, these statutes of limitation would independently bar the prosecution of claims predating the Elrod opinion.

This Court should not review the substantive constitutional issues advanced by Aufiero because the First Circuit did not squarely decide those issues. The First Circuit declined to determine the scope of First Amendment protection for patronage activity. 639 F. 2d at 51. With respect to the possible significance of Perry v. Sinderman and Keyishian v. Board of Regents, the First Circuit noted that "plaintiff's case below was based entirely on Elrod, despite the early assertion of a non-retroactivity defense." 639 F. 2d at 52. By his omission, Aufiero was thus deemed to have waived any claim under Perry v. Sinderman and Keyishian v. Board of Regents. In the absence of any decision, rather than dicta, on these substantive issues, Sup. Ct. Rule 17.1(c) does not support the issuance of a writ of certiorari.

CONCLUSION

For the reasons set forth above, the Court should deny Aufiero's petition for a writ of certiorari to review the First Circuit's decision.

Respectfully submitted,

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DATED: May 18, 1981